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CASE SUMMARY

UNITED STATES V. CANO: THE NINTH CIRCUIT LIMITS WARRANTLESS SEARCHES OF CELL PHONES AT THE BORDER

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INTRODUCTION

In 1956, the first commercial hard drive could store 3.75 megabytes of data between 50 disks.¹ The operating system weighed over one ton.² Today, Apple's iPhone 11 Pro can store up to 512 gigabytes of data on a device that weighs under seven ounces.³ This means that today an individual can have approximately 140,000 times more data stored on a cell phone in their pocket. With this storage capacity, cell phones can store data containing your favorite songs, texts messages sent between friends, and the call history between you and your grandmother. However, a cell phone may contain more sensitive information, such as an electronic record of your location history, an e-book that indicates your political party affiliation, or private photos sent between you and your significant other.

Individuals crossing the United States border with their cell phones, likely containing both innocuous and sensitive data, may have their cell phones searched by a United States Customs and Border Patrol officer or

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¹ 1956: *First Commercial Hard Disk Drive Shipped*, COMPUTER HISTORY MUSEUM (Sept. 19, 2018), <https://www.computerhistory.org/storageengine/first-commercial-hard-disk-drive-shipped/>.

² *Id.*

³ *iPhone 11 Pro*, APPLE, INC., <https://www.apple.com/iphone-11-pro/specs/> (last visited Oct. 12, 2019).

Homeland Security agent.⁴ In *United States v. Cano*, the Ninth Circuit Court of Appeals held that certain limitations apply to searches of cell phones at the border.⁵ First, the search must be limited in scope; the search must be conducted to discover digital contraband, not evidence of a future crime.⁶ Second, if the search is forensic, meaning the search greatly intrudes upon the privacy of an individual, the search is only valid if the government actor had reasonably believed that the cell phone possessed contraband.⁷

I. BACKGROUND

A. FACTUAL BACKGROUND

On July 25, 2016, Defendant-Appellant Miguel Angel Cano traveled from Tijuana to the San Ysidro Port of Entry to cross the border between the United States and Mexico.⁸ A United States Customs and Border Patrol (CBP) officer conducted a routine primary inspection of Cano.⁹ Cano informed the officer that Cano lived in Mexico, worked in San Diego, and intended to visit Los Angeles on that particular day.¹⁰ The CBP computer system randomly selected Cano as a candidate for secondary inspection.¹¹ As part of the secondary inspection, a narcotics-detecting dog alerted a CBP official to the spare tire located on the undercarriage of Cano's truck.¹² The official removed the spare tire and discovered 14 vacuum sealed packages collectively containing 14.03 kilograms of cocaine.¹³ Cano was arrested and Cano's cell phone was seized as an administrative procedure associated with the arrest.¹⁴

CBP officials notified Homeland Security of Cano's arrest.¹⁵ Two Homeland Security agents, Petonak and Medrano, were dispatched to the scene.¹⁶ Petonak manually inspected the contents of Cano's cell phone in search of investigative leads pertinent to the current case and evidence related to transportation of other materials across the border.¹⁷ Petonak

⁴ U.S. v. Cano, 934 F.3d 1002, 1012 (9th Cir. 2019).

⁵ *Id.* at 1007.

⁶ *Id.* at 1013–14.

⁷ *Id.* at 1014–16 (9th Cir. 2019).

⁸ *Id.* at 1008.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

noted that Cano's cell phone contained a robust call log but no text messages.¹⁸

Petonak interrogated Cano, who waived his *Miranda* right to stay silent.¹⁹ Cano denied knowledge of the cocaine.²⁰ Cano told Petonak that he had moved from Los Angeles to Tijuana and crossed the border every day for the past three weeks in search of work in San Diego.²¹ Cano stated that, on this particular day, he crossed the border to obtain work from a carpet store in Chula Vista.²² Petonak asked Cano the name and address of the carpet store in Chula Vista, but Cano was unable to provide this information and claimed that he intended to search for the store on Google after crossing the border.²³ Cano explained that he did not have flooring tools on his person or in his truck because his tools were located in Los Angeles and he planned to retrieve them only after he was successful in obtaining work in San Diego.²⁴ Petonak questioned Cano about the contents of his cell phone.²⁵ Petonak asked why Cano did not have text messages on his phone and Cano stated that, based on the advice of his cousin, he deleted all of his text messages to avoid potential conflict with Mexican police.²⁶

While Petonak questioned Cano, Medrano conducted a second manual search of Cano's cell phone.²⁷ Medrano recorded some of the phone numbers that appeared on Cano's call log and took photographs of two text messages that Cano received since arriving at the border.²⁸ Medrano then conducted a forensic examination of Cano's cell phone.²⁹ Medrano used the computer software program, Cellebrite, which allows an individual to search for and selectively download content from a cell phone.³⁰ The content can include text messages, contacts, call logs, media, and data related to applications installed on the cell phone.³¹ Cellebrite does not access data stored within third-party applications.³² Medrano presented the findings of the second manual search and the fo-

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1008-09.

³¹ *Id.*

³² *Id.* at 1009.

rensic search to Petonak.³³ Later, Petonak determined that Cano's call log did not contain records of phone calls to any carpet stores in San Diego.³⁴

B. PROCEDURAL BACKGROUND

Cano was indicted for the importation of cocaine, a controlled substance.³⁵ Before Cano's initial trial, Cano asked the district court to suppress evidence obtained from the warrantless search of his cell phone conducted by agents Petonak and Medrano at the United States-Mexico border.³⁶ The court denied Cano's request, holding that both manual searches and the forensic search were permissible border searches.³⁷

For trial, Cano prepared a defense in which he implicated his cousin, Jose Medina, by claiming that Medina placed the cocaine on Cano's truck without the knowledge or consent of Cano.³⁸ As evidence, Cano planned to bring evidence that showed Medina had access to the truck because Medina had a key to the truck and Medina had recently driven the truck across the United States-Mexico border.³⁹ Cano also prepared to present evidence of Medina's past criminal convictions for possession of cocaine, Medina's membership in the Chico-based gang, the Latin Kings, and the Latin Kings' system of cocaine distribution throughout the United States and across the United States-Mexico border.⁴⁰

To gather more evidence to aid in the establishment of the defense, Cano requested that the district court order the Homeland Security Investigations (HSI), the Federal Bureau of Investigation (FBI), and the Drug Enforcement Agency (DEA) to turn over information that shows Medina's involvement in drug trafficking and the presence of the Latin King gang in Southern California.⁴¹ The government argued that Cano was not entitled to information from the FBI and DEA because the information sought was not sufficiently important to Cano's case and these federal agencies were not involved in the matter.⁴² The district court approved Cano's request, noting that the HSI can facilitate the dissemination of information from the two federal agencies to Cano.⁴³ Cano received Me-

³³ *Id.* at 1008-09.

³⁴ *Id.* at 1009.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1009-10.

dina's immigration file and Bureau of Prisons records from the HSI.⁴⁴ The prosecutor requested access to information from the FBI and DEA.⁴⁵ Both agencies denied the prosecutor's request.⁴⁶ The lower court, in reconsidering Cano's motion to receive information from the FBI and DEA, held that the prosecutor did not have an obligation to turn over this information because the prosecutor did not have access to potential evidence in the possession of the two federal departments.⁴⁷

The government offered Medina immunity from criminal charges and immigration to the United States in exchange for his cooperation regarding the drug importation scheme.⁴⁸ Initially, Medina denied involvement in any drug-related matters, but he later indicated that he would cooperate with the government's efforts because he could assist the government in stopping organized criminal activity on a large scale.⁴⁹ The information conveyed between Medina and the government was available to Cano.⁵⁰

At Cano's trial, the government presented the evidence gathered from Cano's cell phone by agents Petonak and Medrano.⁵¹ Cano presented a defense in which he implicated his cousin, Jose Medina.⁵² The first trial resulted in a mistrial because there was a hung jury.⁵³ However, Cano was convicted at the retrial.⁵⁴

II. ANALYSIS

Cano appealed to the Ninth Circuit Court of Appeals, claiming that the evidence obtained from his cell phone should have been suppressed at trial because the warrantless search violated Cano's rights under the Fourth Amendment, the prosecutor's failure to disclose materials from the FBI and DEA violated due process, and the government engaged in prosecutorial misconduct during closing argument.⁵⁵ Ultimately, the Ninth Circuit held that the evidence obtained from the warrantless search of Cano's cell phone should have been suppressed at trial but the government did not violate due process by failing to deliver documents from the

⁴⁴ *Id.* at 1010.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1009.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1009–10.

⁵³ *Id.* at 1010.

⁵⁴ *Id.*

⁵⁵ *Id.*

FBI and DEA.⁵⁶ The court did not address the question of prosecutorial misconduct.⁵⁷ Based on these findings, the court reversed the district court's order denying Cano's motion to suppress evidence obtained from the warrantless searches of his cell phone and vacated Cano's conviction.⁵⁸

A. THE LOWER COURT ERRED BY PERMITTING EVIDENCE OBTAINED FROM CANO'S CELL PHONE IN VIOLATION OF THE FOURTH AMENDMENT TO BE ADMITTED AT TRIAL

The Ninth Circuit began by quoting the Fourth Amendment of the United States Constitution which states that it is "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁵⁹ Interpreting this passage and binding precedent, the court explained a search is presumed to be in violation of the Fourth Amendment unless a judicial officer issues a warrant, based on probable cause, that describes the location of the search.⁶⁰ However, there are certain searches that can be conducted without a warrant, such as searches that occur at the border that promote the nation's interest in "examining persons and property crossing into this country."⁶¹

A warrantless search conducted at the border must be conducted to enforce importation laws by seizing "merchandise which . . . shall have been introduced into the United States in any manner contrary to law."⁶² A warrantless search at the border cannot be used to generally enforce law.⁶³ Warrantless, forensic searches of cell phones may only be conducted by a border agent if the agent had reasonable suspicion that the individual possessed contraband.⁶⁴ On appeal, Cano claimed that the warrantless, forensic search of his cell phone at the border violated the Fourth Amendment.⁶⁵

Although Cano argued that all searches of cell phones at the border violate the Fourth Amendment because the searches are not used to enforce importation laws since cell phones cannot contain contraband, the

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1026.

⁵⁹ *Id.* at 1010 (quoting U.S. Const. amend. IV).

⁶⁰ *Id.*

⁶¹ *Id.* at 1011–12 (quoting *U.S. v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013)).

⁶² *Id.* at 1013 (quoting *U.S. v. Soto-Soto*, 598 F.2d 545, 548–59 (9th Cir. 1979)).

⁶³ *Id.*

⁶⁴ *Id.* at 1012 (citing *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537–51 (1985)).

⁶⁵ *Id.*

Ninth Circuit disagreed.⁶⁶ Reasoning that contraband can be stored on cell phones in digital form, such as child pornography, the court held that searches of cell phones at the border can be conducted to enforce importation laws.⁶⁷

However, the Ninth Circuit agreed with Cano's second argument, holding that this specific cell phone search violated the Fourth Amendment because the agents acted to prevent future crimes rather than to enforce importation laws by seizing contraband.⁶⁸ Cano argued that the search was not limited to a search for contraband because the agents searched Cano's call log and text messages in order to find investigative leads and evidence related to future criminal activity.⁶⁹ The court held that border searches must be limited to searches designed to enforce importation laws, such as seizing contraband.⁷⁰ The court acknowledged the difference between contraband and evidence, offering several examples.⁷¹ For example, child pornography would constitute both contraband and evidence because it is illegal to possess such material, deeming the photos contraband, and also proof of a crime, deeming the photos evidence.⁷² On the other hand, emails on a cell phone are not contraband because it is not outright illegal to possess emails, but the same emails could be used as evidence to prove a price-fixing case.⁷³ Here, the court held that the search of Cano's cell phone, namely the call logs and text messages, violated the Fourth Amendment because the officers searched for evidence of a future crime rather than contraband.⁷⁴

Third, the court rejected Cano's argument, supported by an amicus brief filed by the Electronic Frontier Foundation, that forensic searches of cell phones must be supported by probable cause rather than reasonable suspicion because cell phones contain intimate details of individuals.⁷⁵ Probable cause is a heightened standard of suspicion, which would only allow an officer to conduct the search if the officer believed, based on the evidence, that the individual committed or will commit a crime.⁷⁶ However, in *Cotterman*, the court previously held that electronic devices, specifically laptops, can be forensically searched so long as the officer had reasonable suspicion that the individual may have committed or will

⁶⁶ *Id.* at 1013–14.

⁶⁷ *Id.* at 1014.

⁶⁸ *Id.* at 1018–19.

⁶⁹ *Id.* at 1026.

⁷⁰ *Id.* at 1017.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* 1016–19.

⁷⁵ *Id.* at 1014–1015.

⁷⁶ *Probable Cause*, BLACK'S LAW DICTIONARY (2nd ed. 1910).

commit a crime.⁷⁷ The court rejected Cano and EFF's proposal to adopt the heightened standard of probable cause because precedent in *Cotterman* allows for forensic searches at the border of electronic devices, now including cell phones, to be based on reasonable suspicion.⁷⁸

However, the court agreed with Cano that the search violated the Fourth Amendment because the forensic search of Cano's cell phone was not supported by reasonable suspicion that the cell phone contained contraband.⁷⁹ The court articulated that, while a manual search of a cell phone can be conducted without suspicion, a forensic search - which is more intrusive into the privacy of the individual - of a cell phone must be supported by reasonable suspicion that the individual possessed contraband.⁸⁰ In Cano's case, the court stated that the initial, manual search of Cano's cell phone was justified as this search did not require heightened suspicion.⁸¹ However, because the officers did not have reasonable suspicion that the cell phone contained contraband, the forensic search using the Cellebrite software violated the Fourth Amendment.⁸²

The court held that contraband can take digital form, warrantless border searches must be limited to searches for contraband, and forensic searches must be justified by reasonable suspicion.⁸³ Because the second search of Cano's cell phone was a search for evidence of a future crime rather than contraband, and the forensic search was not based on reasonable suspicion that the cell phone contained contraband, the search of Cano's cell phone violated the Fourth Amendment.⁸⁴ The lower court erred by allowing evidence found on Cano's cell phone to be admitted at trial.⁸⁵

B. THE LOWER COURT ERRED BY PERMITTING ILLEGALLY OBTAINED EVIDENCE TO BE ADMITTED AT TRIAL BECAUSE THE OFFICERS DID NOT SEARCH CANO IN RELIANCE ON BINDING JUDICIAL PRECEDENT

Generally, the exclusionary rule prohibits the use of illegally obtained evidence at trial.⁸⁶ However, evidence obtained from an illegal search can be introduced at trial as an exception to the exclusionary rule

⁷⁷ *Cano*, 934 F.3d at 1014–15.

⁷⁸ *Id.* at 1016.

⁷⁹ *Id.* at 1021.

⁸⁰ *Id.* at 1019–20.

⁸¹ *Id.* at 1019.

⁸² *Id.* at 1021.

⁸³ *Id.* at 1014.

⁸⁴ *Id.* at 1019.

⁸⁵ *Exclusionary Rule*, BLACK'S LAW DICTIONARY (2nd ed. 1910).

⁸⁶ *Cano*, 934 F.3d at 1021.

“when [a government official] conduct[s] a search in objectively reasonable reliance on binding judicial precedent.”⁸⁷ The court emphasized that the government official must be acting in good faith on binding appellate precedent that “specifically authorizes” the conduct to obtain the evidence; it is not sufficient for a government actor to rely on case law that is “unclear.”⁸⁸

The court found that the evidence obtained from the unlawful search of Cano’s cell phone should not have been introduced at trial pursuant to the exclusionary rule because the officers did not act in reliance on binding judicial precedent.⁸⁹ The government argued that Petonak and Medrano acted in reliance on the binding judicial precedent in *Cotterman* to conduct the search of Cano’s cell phone.⁹⁰ The court stated that *Cotterman* was not binding precedent on this case because *Cotterman* permitted searches for contraband; *Cotterman* did not permit searches for evidence of future crimes.⁹¹ The court further explained that “[s]earching for evidence and searching for contraband are not the same thing.”⁹² Ultimately, the court found that the exclusionary rule barred the introduction of evidence obtained from the unlawful search of Cano’s cell phone because there was no precedent that permitted agent Petonak and Medrano’s search for evidence of a future crime.⁹³

C. THE PROSECUTOR DID NOT VIOLATE THE DUE PROCESS CLAUSE BY FAILING TO DELIVER DOCUMENTS HELD BY OTHER FEDERAL AGENCIES

Cano argued that the prosecutor violated the Due Process Clause by withholding information from the FBI and DEA.⁹⁴ The court held that the prosecutor did not violate the Due Process Clause because the prosecutor did not have access to FBI and DEA documents.⁹⁵

⁸⁷ *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 239 (1976)).

⁸⁸ *Id.* (quoting *U.S. v. Lara*, 815 F.3d 605, 613-14 (9th Cir. 2016)).

⁸⁹ *Id.* at 1021-22.

⁹⁰ *Id.* at 1021.

⁹¹ *Id.* at 1022.

⁹² *Id.*

⁹³ *Id.* at 1021-22.

⁹⁴ *Id.* at 1025.

⁹⁵ *Id.* at 1026.

D. THE COURT DID NOT ADDRESS THE ISSUE OF PROSECUTORIAL MISCONDUCT

On appeal, Cano claimed that the prosecutor committed prosecutorial misconduct.⁹⁶ Because the court vacated Cano's conviction based on the introduction of illegally obtained evidence at trial, the court did not address this issue.⁹⁷

III. IMPLICATIONS

The Ninth Circuit's conclusions in *Cano* are in conflict with *United States v. Kolsuz*, a decision by the United States Court of Appeals for the Fourth Circuit.⁹⁸ In *Kolsuz*, two federal agents received a tip that Kolsuz was known to smuggle firearms and would soon be traveling through the Washington Dulles International Airport.⁹⁹ Based on this information, the agents conducted a warrantless, forensic search of Kolsuz's cell phone.¹⁰⁰ Although the agents did not have cause to believe that Kolsuz was currently smuggling firearms, the Fourth Circuit ratified the agents' conduct by stating that the warrantless, forensic search was justified by "the prevention and disruption of ongoing efforts to export contraband illegally."¹⁰¹ The broad language in *Kolsuz* allows the government to conduct warrantless, forensic searches of cell phones at the border so long as the individual poses a threat to enforcement efforts; the government does not need to have belief that the individual is currently committing a crime to conduct the intrusive search.¹⁰² The Fourth Circuit's holding is in direct conflict with the Ninth Circuit's ruling in *Cano*, which states that warrantless, forensic searches of cell phones at the border must be supported by a particularized suspicion that the individual is currently engaged in a violation of importation laws.¹⁰³

Because the rulings of the Ninth Circuit and the Fourth Circuit are in conflict, this issue of whether the government can conduct a warrantless, forensic search of a cell phone at the border is prime for review by the Supreme Court.

⁹⁶ *Id.* at 1010.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1017.

⁹⁹ *U.S. v. Kolsuz*, 890 F.3d 133, 138 (4th Cir. 2018).

¹⁰⁰ *Kolsuz*, 890 F.3d at 139.

¹⁰¹ *Kolsuz*, 890 F.3d at 143–44.

¹⁰² *Kolsuz*, 890 F.3d at 143–44.

¹⁰³ *Cano*, 934 F.3d at 1017.

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CONCLUSION

For the many people traveling across the United States border with a cell phone containing large amounts of personal information, there will be uncertainty as to what prerequisites must be satisfied before a federal agent can conduct a warrantless, forensic search of a person's cell phone. Until the judiciary provides clarity on this point, travelers should be ware.

